Petition

81-1172
19

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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SUPREME COURT, U.S.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Petitioners,

—v.—

CITY OF AKRON, *et al.*,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's summary affirmance of Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), aff'd mem. sub nom. Gary-Northwest Indiana Women's Services, Inc. v. Orr, 451 U.S. ___, 101 S.Ct. 2012 (1981), compelled the United States Court of Appeals for the Sixth Circuit to uphold an ordinance of the City of Akron, Ohio, mandating that all abortions after the first trimester of pregnancy be performed in hospitals accredited by the Joint Commission on Accreditation of Hospitals.

2. Whether the requirement that all second trimester abortions be performed in hospitals, regardless of the

techniques used or the stage of gestation, is unconstitutional because it unnecessarily burdens women needing such abortions and their physicians and is not narrowly drawn to further legitimate maternal health interests.

THE PARTIES BELOW

The petitioners in this case include the Akron Center for Reproductive Health, Inc., Akron Women's Clinic, Inc., Womencare, Inc., and Dr. Robert Bliss. Respondents include the City of Akron, Ohio, and its Mayor, its Director of Public Health, and its Police Prosecutor.[1/]

1/ Two parties, Francois Seguin and Kathleen Black, were permitted by the district court to intervene in this action "in their individual capacity as parents of unmarried daughters of childbearing age." (Order of the District Court, May 16, 1978.) Pursuant to the order of the district court, the intervenors were not permitted to participate in those aspects of this action presented for review on this petition. See brief filed by the Akron Center for Reproductive Health, et al., in response to petitions for certiorari filed by the City of Akron and intervenors in Supreme Court cases numbered 81-746 and 81-854 (p. 5, n.4).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, issued on June 12, 1981, has been reported as Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (1981). (See Appendix to the City of Akron's Petition for Certiorari, No. 81-746, pp. 1a - 42a.) The opinions of the United States District Court for the Northern District of Ohio, Eastern Division, issued on August 22, 1979, and on October 4, 1979, have been reported as Akron Center for Reproductive Health, Inc., v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 12, 1981. (See Appendix to the City of Akron's Petition for Certiorari, No.81-746, pp. 1a - 42a.) Petitions for rehearing were filed by petitioners and intervenors. The court of appeals denied all parties' petitions for rehearing by July 22, 1981. On October 6, 1981, petitioners filed an application for extension of time in which to file their petition for writ of certiorari. In an order dated October 16, 1981, Associate Justice O'Connor granted petitioners' application and extended the time for filing a petition for writ of certiorari to and including December 19, 1981. This Court's jurisdiction is invoked under Title 28, U.S.C., Section 1254(1).

STATUTES INVOLVED

The City of Akron Ordinance involved is Ordinance Number 160-1978 (hereinafter referred to by its Akron Codified Ordinance designation, Chapter 1870).[2/] The sections of that ordinance at issue in this Cross-Petition are:

CHAPTER 1870

1870.01 DEFINITIONS

As used in this Chapter:

***

(B) "Hospital" means a general hospital or special hospital devoted to gynecology or obstetrics which is accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association.

***

2/ The full text of Akron Ordinance Number 160-1978 is set forth in the Appendix to the City of Akron's petition for writ of certiorari in Supreme Court case number 81-746. (Appendix at 115a-129a)

> (C) "Abortion Facility" means a clinic, physician's office, or any other place or facility in which abortions are performed, other than a hospital.
>
> ***
>
> 1870.03 ABORTION IN HOSPITAL
>
> No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed in a hospital.
>
> ***

STATEMENT OF THE CASE

A. History of the Legislation

On February 28, 1978, the Akron City Council, by a vote of seven to six, enacted Chapter 1870, a nine-page, nineteen-section compendium of regulations restricting the availability of abortions in Akron, Ohio. Included

within Chapter 1870 was Section 1870.03, which prohibits the performance of any abortion outside a hospital "subsequent to the end of the first trimester" of pregnancy.[3/]

B. History of the Litigation

The present litigation was commenced on April 19, 1978, before the Honorable Leroy Contie, Jr. , United States District Judge for the Northern District of Ohio, Eastern Division.

3/ The process by which Chapter 1870 was produced was marked by drastic departures from normal legislative procedure, including a statement by the Akron City Law Department that the legislation was, in large measure, unconstitutional (J.A. 321-394) and statements by the Mayor, the Director of Public Health, and the local medical society that there was no medical or health-related need for the legislation. (A. E. 18-20, 43-44, 46) (The citations in this brief are to the Joint Appendix (J.A.) or Appendix of Exhibits (A.E.) submitted to the United States Court of Appeals for the Sixth Circuit; or to the Appendix (D.App.) to the Petition for Certiorari, No. 81-746, of the City of Akron; or to Petitioner Akron Center for Reproductive Health's Appendix to this Petition (App.). Additional citations are to the original transcript (T.).)

Plaintiffs[4/] challenged Chapter 1870 as unconstitutional and sought injunctive and declaratory relief. On April 28, 1978, a temporary restraining order was granted. Trial on the merits took place from September 5 to September 19, 1978.

On August 22, 1979, the district court issued its decision, holding, inter alia, that plaintiffs lacked standing to challenge Section 1870.03. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1185 (N.D. Ohio 1979). Plaintiffs moved the district court for a new trial, or, in the alternative, to alter or amend the judgment, and on October 4,

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4/ Hereinafter all parties will be referred to by their designation in the district court. Petitioners will be denominated "plaintiffs" and respondents "defendants."

1979, the district court "granted in part and denied in part" that motion. 479 F. Supp. at 1214-1215. The district court reversed its previous determination that plaintiffs did not have standing to challenge Section 1870.03. Id. On the merits, the district court held that Section 1870.03 was constitutional. Id. at 1215.

Plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit, which on June 12, 1981, upheld the constitutionality of Section 1870.03. The court found an "abundance" of evidence demonstrating both the safety of early second trimester abortions outside hospitals and the significant burden created denying many women access to abortions. Akron Center for Reproductive Health, Inc. v.

City of Akron, 651 F.2d 1198, 1208-1210 (6th Cir. 1981) (see D. App. pp. 1a-42a). Despite the evidence, the Sixth Circuit held that it was constrained to uphold Section 1870.03 because of this Court's summary affirmance of the three-judge district court decision in Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 496 F. Supp. 894, 896-902 (N.D. Inc. 1980), aff'd mem. sub nom. Gary-Northwest Indiana Women's Services, Inc. v. Orr, 451 U.S. ___, 101 S.Ct. 2012 (1981). 651 F. 2d at 1210.

C. The Evidence Proves and the Court of Appeals Found That Early Second Trimester Abortions May Be Safely Performed in Outpatient Clinics, and the Absolute Requirement That All Such Procedures Be Performed Only in Hospitals Substantially Burdens Women Seeking Abortions

Section 1870.03 requires that every abortion subsequent to the end of

the first trimester of pregnancy be performed in a hospital. Plaintiffs presented extensive evidence demonstrating the unavailability of hospitals to do these procedures, the desperate need for access to facilities by women seeking second trimester abortions, the development of a medical technique (dilatation and evacuation, "D & E") that makes these procedures, particularly up to the eighteenth week of pregnancy, as safe or safer in clinics as in hospitals, and the burdens of cost and travel that the hospital requirement imposes. Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1208, 1209.

In 1972, the accepted medical practice was to perform abortions after the first trimester by the use of

infusion techniques performed in hospitals. (J.A. 92-93)[5] Recent research and practical experience throughout the country demonstrate that this practice is no longer favored. An abortion technique known as dilatation and evacuation (D & E)[6] is now not only the most widely used method of early second trimester abortions, but is also over twice as safe as the older method.[7] Furthermore,

5/ See medical studies referred to in Roe v. Wade, 410 U.S. 113, 150 n.44; 216 n.5 (Burger, J., concurring) (1973).

6/ D & E is an extension of the first trimester dilatation and curettage procedure. It typically involves use of a small forceps for the removal of fetal material, of a suction cannula for the aspiration of amniotic fluid and of placental and fetal debris, and of a surgical curette to ensure complete evacuation. (T., Dr. Crist, Vol. I, 30)

7/ Government statistics presented at the trial of this case in 1978 showed that early second trimester abortions done by the "D & E" method were more than 160% safer than saline instillation procedures, which in turn were 60% safer than prostaglandin instillation procedures. Cates, The Effect of Delay and Method Choice On the Risk of Abortion Morbidity, 9 FAMILY PLANNING PERSPECTIVES 266, 268 (1977). (A.E. 39-42)

both statistical evidence and expert testimony at trial demonstrated that early second trimester abortions by the D & E method may not only be safely performed in qualified non-hospital facilities, but, under some circumstances, may be safer in clinics. (J.A. 94, 441-442)[8/] Government statistics show the increasing use and safety of this method for early second trimester abortions and its increasing acceptance as a safe method for use in

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8/ See also the Eighth Circuit opinion in Planned Parenthood Association of Kansas City v. Ashcroft, Nos. 80-1130 and 80-1530 (8th Cir. Nov. 30, 1981) (supplemental opinion), stating, in striking down a similar Missouri restriction, "[e]vidence adduced at the original trial in this cause and the evidentiary hearing suggests that the non-hospitalized procedures may actually be safer." (App. A at 13a)

outpatient facilities.[9/] Early second trimester abortion by the D & E proce-

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9/ Since government statistics and published studies tend to be based on data at least two years old (T. Dr. Crist, Vol. I, 34), the data presented in the amici brief submitted in the Sixth Circuit in 1980 by the American Public Health Association and Planned Parenthood Federation of America reinforce these findings. Dr. Willard Cates, Chief of the Abortion Surveillance Branch, Center for Disease Control, United States Department of Health and Human Services, stated that, as of 1980, "the vast majority of D & E procedures [in the 13-16 week] interval are being performed in non-hospital facilities," and that "[a]vailable data show that approximately one-third of all abortion procedures performed at 13 weeks gestation or later are in non-hospital facilities, and most of these are presumably D & E procedures." For the demonstrated safety of D & E procedures in clinics see Cates, Grimes, Deaths From Second Trimester Abortion by Dilatation and Evacuation: Cause, Prevention and Facilities, 58 OBSTET & GYN 401 (1981). The latest annual report from the Center for Disease Control, Abortion Surveillance: 1978, U.S. DEPT. H.H.S., published in 1980, shows that the mortality risk from saline procedures is 80% greater than from D & E abortions. (p. 9) (see n.7 for morbidity comparison). The American Public Health Association has changed its original position that second trimester abortions should be performed in hospitals and now endorses the provision of early second trimester D & E abortions in freestanding qualified clinics. American Public Health Association Resolution, "The Right to Second Trimester Abortion" (Adopted, Nov. 1979) (App. D at 26a)

dure is safer than childbirth. (J.A. 90, Trial Ex. 69)[10/]

The Court of Appeals for the Sixth Circuit carefully reviewed this evidence and found that there was "an abundance of evidence that D & E is the safest method of performing post-first trimester abortions," and could be safely done on an outpatient basis in

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10/ The court in Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980), found that "the D & E method of abortion up to the eighteenth week of pregnancy is safer than childbirth." 488 F. Supp. at 195. In Wolfe v. Stumbo, No. C80-0285 L(A) (W.D. Ky. Dec. 3, 1980), the court found, "the abortion mortality rate, using the D & E method, is considerably lower than the mortality rate for women who carry their pregnancies to term." Slip op. at 2.

Akron. 651 F.2d at 1209.[11/]

The ban on the performance of early second trimester abortions in clinics in Akron, Ohio, imposes a substantial burden on women seeking abortions there.[12/] The Court of Appeals

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11/ These findings are consistent with those made by the Eighth Circuit Court of Appeals in Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir. 1981), and in Nos. 80-1130 and 80-1530 (8th Cir. Nov. 30, 1981), (supplemental opinion) (App. A), that (1) D & E is the most widely used and safest procedure for second trimester abortion (655 F.2d at 855), (supplemental opinion, App. A at 6a - 7a); (2) in Missouri, second trimester abortions by any method are not readily available in hospitals (App. A at 7a - 10a); (3) there is an unmet need for second trimester abortions (App. A at 7a - 10a); (4) hospitalized D & E procedures are up to twice as expensive (App. A at 8a - 9a); and (5) the requirement of hospitalization creates a substantial interference with the abortion decision (App. A at 10a). Further, the circuit upheld the district court finding that non-hospital D & E procedures are just as safe as those in hospitals (App. A at 13a).

12/ Plaintiffs' witness Dr. Christopher Tietze, Senior Fellow at the Center for Policy Research of the Population Council and author of more than sixty articles on abortion and population statistics testified that there was an unmet need for second trimester abortion services in Akron. (J.A. 378, 379).

identified two distinct, serious burdens; limitations on access and multiplication of costs. 651 F.2d at 1209. First, with respect to limitations on access, the court of appeals found,

> There was unrebutted testimony that there were only two hospitals in Akron in which second trimester abortions were being performed. During the year preceding trial, only nine such abortions were performed in these two hospitals. It was testified that approximately 10% of the 6,000 women who sought abortions at the Akron clinics during the same period were in their second trimester of pregnancy. Many of these women were referred to clinics in Cleveland, Ohio, and in the State of Michigan. Those who were unable to travel to those places were faced with the choice of carrying the baby to term, attempting self-abortion, or seeking illegal abortions. The mortality and morbidity incidence of self-abortions and illegal

> abortions greatly exceeds that of the second trimester D & E procedure.

Id. Second, with respect to cost, the court of appeals found "...a second trimester abortion in a hospital costs $850 - $900, while total charges for a D & E abortion in a clinic are $350 - $400." Id. The court of appeals found that the effect of these two burdens "was to make second trimester abortions completely unavailable for many women who desire them." Id. These factual findings are consistent with those found by other courts which have reviewed similar statutes.[13/]

13/ See Planned Parenthood Association of Kansas City v. Ashcroft, 483 F. Supp. 679 (W.D. Mo. 1980), aff'd in part, rev'd in part, and remanded, 655 F.2d 848 (8th Cir. 1981), No. 79-4142-CV-C-H (W.D. Mo. Oct. 12, 1981) (on remand), Nos. 80-1130 and 80-1530 (8th Cir. Nov. 30, 1981) (supplemental opinion) (App. A); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D.

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REASONS FOR GRANTING THE WRIT

There are three reasons why this Court should grant this cross-petition for a writ of certiorari.

First, the decision of the Sixth Circuit is in direct conflict with a decision of the Eighth Circuit in Planned Parenthood Association of Kansas City v. Ashcroft, Nos. 80-1130 and 80-1530 (8th Cir. Nov. 30, 1981) (supplemental opinion) (App. A, 1a - 18a). (See also 655 F.2d 848 (8th Cir. 1981).)

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La. 1980); Wolfe v. Stumbo, No. C 80-0285-L(A) (W.D. Ky. Dec. 3, 1980). See also the regulation of the New Jersey State Medical Board which authorizes clinics to perform second trimester abortions through the seventeenth week, if performed by D & E, upheld as rational because of the safety of that method. N.J.A.C. 13:35-7.2. Livingston v. N.J. Board of Medical Examiners, 168 N.J. Super. 259 (App. Div. 1979), certif. denied, 82 N.J. 291 (1979).

This decision held unconstitutional an abortion restriction identical to that upheld here. Second, the decision of the Sixth Circuit conflicts with rulings of this Court holding that the Constitution requires that restrictions on access to abortion be carefully limited to further legitimate state interests. Third, the decision of the Sixth Circuit according binding effect to this Court's summary affirmance in Gary-Northwest Indiana Women's Services, Inc. v. Orr, 451 U.S. ___, 101 S.Ct. 2012 (1981), misperceives the decisions of this Court on the effect of summary affirmance and squarely conflicts with the Eighth Circuit's reading of the effect of that summary affirmance.

I. THE SIXTH CIRCUIT'S DECISION IS SQUARELY IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY V. ASHCROFT

A prime function of this Court's certiorari jurisdiction is to resolve direct conflicts between federal circuit courts of appeals, particularly where those conflicts involve important issues of federal constitutional law. Supreme Court Rule 17.1(a). In Planned Parenthood Association of Kansas City v. Ashcroft, Nos. 80-1130 and 80-1530 (8th Cir. Nov. 30, 1981) (supplemental opinion) (App. A, 1a - 18a), the Eighth Circuit Court of Appeals upheld a district court decision, based on extensive evidentiary findings, holding unconstitutional a statute demanding, in terms identical to those of the statute at

issue here, that all second trimester abortions be performed in hospitals. The conflict between the Sixth and Eighth Circuits on the constitutionality of laws flatly banning all outpatient abortions in the second trimester of pregnancy is clear and direct.[14/] The

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14/ The decision of the Eighth Circuit in Planned Parenthood Association of Kansas City v. Ashcroft is also in conflict with a decision of the highest court in Virginia which upheld the constitutionality of a Virginia statute requiring second trimester abortions be performed in hospitals. Commonwealth v. Simopoulos, ___Va.2d___, 277 S.E.2d 194 (1981). This case is now pending on appeal before this Court as Simopoulos v. Commonwealth of Virginia, No. 81-185. Although the Virginia state statute is similar to those of Akron and Missouri, the issues before this Court are not identical, since the Simopoulos case arose out of a criminal prosecution of a doctor who performed a saline instillation procedure outside of a hospital, and the state Supreme Court decision did not address the constitutionality of the Virginia statute as applied to early outpatient D & E procedures. The appeal there also involves issues other than the constitutionality of the Virginia law. However, in granting a motion by Dr. Simopoulos for restoration of his licence pending his appeal in state court, the

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issue is one of fundamental constitutional importance, currently pending in district courts of three additional circuits.[15/] The conflict between the

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Fourth Circuit Court of Appeals in a per curiam opinion noted, on the issue of the constitutionality of the Virginia statute, "At this stage of the proceedings, we observe, without reaching any definite conclusion, that, although the Supreme Court has not addressed the precise issue, Simopoulos's position [that the Virginia second trimester in-hospital rule is unconstitutional] commands respectable support." (emphasis added) Simopoulos v. Virginia State Board of Medicine (per curiam opinion), No. 80-1431 slip op. at 5 (4th Cir. Aug. 18, 1980).

15/ Subsequent to the summary affirmance in Gary-Northwest, the district court in Margaret S. v. Treen, C.A. No. 78-2765 (E.D. La. Nov. 27, 1981) (see App. C at 22a), granted summary judgment holding a similar in-hospital requirement for second trimester abortions unconstitutional in Louisiana. The court was apparently relying on its detailed findings of fact on the burden such a statute would have in Louisiana after trial on an earlier statute passed in 1978. See Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980). See also Seventh Circuit: Charles v. Carey, 79 C 4551 (N.D. Ill. Nov. 16,

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circuits introduces uncertainty on an issue affecting the constitutional rights and liberty of women and physicians in about ten percent of the cases in which women seek abortions in the United States. (J.A. 376)

(footnote continued from preceding page) 1979) (preliminary injunction), aff'd in part, rev'd in part, and remanded, 627 F.2d 772 (7th Cir. 1980) (interlocutory appeal); Christensen v. Wisconsin Medical Examining Board, No. 80 C 575 (W.D. Wisc., filed Oct. 31, 1980); Poe v. Department of Public Health, C.A. 78-C-4126 (N.D. Ill. May 11, 1981) (summary judgment granted to defendants). Ninth Circuit: Glick v. Bryan, CV-R-81-150 (BRT) (D. Nev. July 7, 1981) (preliminary injunction).

II. THE SIXTH CIRCUIT'S DECISION UPHOLDING THE CONSTITUTIONALITY OF A LAW REQUIRING ALL ABORTIONS AFTER TWELVE WEEKS OF PREGNANCY BE PERFORMED IN HOSPITALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT REQUIRING THAT LAWS RESTRICTING ACCESS TO ABORTION BE NARROWLY DRAWN TO FURTHER LEGITIMATE STATE INTERESTS

Roe v. Wade, 410 U.S. 113 (1973), enunciated a strict test for regulations which limit or interfere with the exercise of "a woman's decision whether or not to terminate her pregnancy." 410 U. S. at 153. Although "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life," such laws must serve compelling state interests and be "narrowly drawn to express only the legitimate interests

at stake..." Id. at 154, 155.

This Court found that the State's important interest in protecting maternal health becomes "compelling" at the end of the first trimester, and that after that point, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Id. at 163.

In Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976), this Court examined a Missouri regulation outlawing the use of the saline amniocentesis procedure after the first twelve weeks of pregnancy.[16/] This

16/ The Missouri statute passed in 1973, and the trial in Planned Parenthood of Missouri v. Danforth took place in 1974. At that time, saline instillation procedures were the prevalent method of second trimester abortions. (See Brief for Appellants, p. 121, Planned Parenthood of Missouri v. Danforth.)

Court held the regulation to be "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." Id. at 79.17/ Among the reasons why the Missouri statute was held unconstitutional were factual findings that the saline amniocentesis procedure was widely accepted in the medical community, that there were severe limitations on access in Missouri to any other second trimester abortion method, and that the prohibition had the anomalous effect of

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17/ This Court has recognized that state regulations which limit access to the means of effectuating privacy decisions are subject to the same strict scrutiny as are laws which would prohibit the decision entirely. Carey v. Population Services International, 431 U.S. 678, 688 (1977).

exposing the women it was supposed to protect to far greater risks than those it eliminated. Id. at 77-78.

Section 1870.03 has precisely those same effects. As demonstrated in Plaintiffs' Statement of the Case, supra, current medical data prove that the performance of second trimester D & E abortions in outpatient facilities is widely accepted in the medical community, and that this practice is as safe as, or safer than, in-hospital procedures. Second trimester D & E abortions are not only twice as safe as the earlier methods, they are much safer than childbirth. (See pp. 9 - 12, supra.) Furthermore, as the Sixth Circuit found, the blanket prohibition imposed by Section 1870.03 causes severe limitations on access, exposing women to far

greater health risks than if physicians were allowed to perform the less costly D & E abortions in clinics. Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1209 (6th Cir. 1981).

Section 1870.03 is precisely the sort of regulation held unconstitutional in Planned Parenthood of Missouri v. Danforth and Carey v. Population Services International. The Sixth Circuit decision in this case is in conflict with these decisions, as well as with Roe v. Wade. This Court should review on writ of certiorari the Sixth Circuit decision because of this conflict.

III. THE SIXTH CIRCUIT DECISION ACCORDING ABSOLUTE PRECEDENTIAL AUTHORITY TO THE SUMMARY AFFIRMANCE OF THIS COURT IN GARY-NORTHWEST IS IN CONFLICT WITH DECISIONS OF THIS COURT

This Court's summary affirmance of Gary-Northwest did not require the Sixth Circuit to overlook the "abundance" of evidence and "persuasive" constitutional rationale for invalidating the Akron second trimester hospital requirement. Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d at 1208 - 1210. Although this Court has held that lower courts are bound by summary actions of the Supreme Court, it has recognized that "[a]scertaining the reach and content of summary actions may itself present issues of real substance." Hicks v. Miranda, 422 U.S. 332, 345 n.14 (1975).

Further, the "precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily defined by those actions.'" Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 182 (1979). The precise issues presented and defined in this case are significantly different from those in Gary-Northwest.

First, the statutes are significantly different. The Indiana statute in Gary-Northwest defines "hospital" to include ambulatory outpatient surgical centers, thereby allowing second trimester abortions in some facilities other than those accredited by the Joint Commission on Accreditation of Hospitals

(JCAH)[18/] By contrast, the hospital required in Section 1870.03 must be a JCAH-accredited hospital. (§1870.01(B)) Thus, the Akron ordinance is much more restrictive. If plaintiff clinics were located in Indiana, they would have the option of applying to qualify as out-patient surgical centers in order to be able to offer second trimester abortion services.

Second, there was no full exploration of the constitutional issues in Gary-Northwest. In the decision appealed from, the three-judge court refused to modify its denial of a preliminary injunction in 1975 and issue a preliminary injunction on the

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18/ See Ind. Code Ann. §§ 35-1-58.5-1(c)(2) and 35-1-58.5-2(b)(2) (App. B, 19a - 21a). The requirements for such centers are found in Ind. Code Ann. §16-10-1-6(b).

in-hospital rule.[19] The section on "Questions Presented" in the Jurisdictional Statement in Gary-Northwest indicates the procedural, rather than substantive, questions at issue. (App. D, 30a-31a)[20]

Third, one basis for the denial of a preliminary injunction in Gary-Northwest was the court's finding of certain evidentiary failures. 496 F. Supp. at

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19/ The district court in Gary-Northwest never held a trial on the merits of the in-hospital rule, nor was there ever a final judgment. 496 F. Supp. at 902. The court's final decision and judgment in the case only addressed the parental consent section of the statute (Ind. Code Ann. §35-1-58.5-2(a)(2)). 421 F. Supp. 734, 736 (N.D. Ind. 1976), aff'd 429 U.S. 1067 (1977).

20/ The first question concerned the characterization of Plaintiffs' motion in the district court as a 60(b) motion. The second contended that a full hearing on the merits was mandated. The third question considered whether the district court abused its discretion in refusing to issue a preliminary injunction. (App. D 30a - 31a)

903. In Gary-Northwest, the sole evidence at the brief preliminary hearing was presented by the affected physician plaintiff. Little evidence was presented concerning the impact of the law on the availability of second trimester abortion services, evidence this Court considered critical in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 77-79 (1976). Furthermore, District Court Judge Sharp specifically found "[t]here was presented no evidence sufficient to convince this Court that birth is more dangerous than early second trimester D & E abortions" (496 F. Supp. at 902, 903), and that the testimony of the plaintiff doctor was not very credible because he had a "pecuniary interest in the outcome." Id. at 903. The court concluded that

"[t]he evidence produced at the hearing was insufficient to persuade this Court that the plaintiff would likely succeed in proving birth more dangerous than an early second trimester D & E abortion." Id.

There are no failures of proof in the instant case. Here plaintiffs presented evidence accepted as compelling by the Sixth Circuit.

The factual and procedural distinction between this case and Gary-Northwest are exactly the sort of differences that have led this Court to caution lower courts not to follow blindly summary affirmances. In Fusari v. Steinberg, 419 U.S. 379 (1975), the district court in Connecticut had ruled that it was precluded from reviewing certain questions because of this

Court's summary affirmance in an earlier case involving an interpretation of the same federal statute. On review, this Court noted that, since resolution of the statutory question in the earlier case was heavily fact-specific, the lower court should "not have felt precluded from undertaking a more precise analysis of the statutory issues...." Id. at 389 n.15. Chief Justice Burger, concurring, stated:

> When we summarily affirm, without opinion, the judgment of a three-judge District Court, we affirm the judgment but not necessarily the reasoning by which it was reached.

Id. at 391.

Similarly, in Mandel v. Bradley, 432 U.S. 173 (1977), this Court was faced with a challenge to a Maryland election law which provided for

earlier filing dates for independent political candidates than for candidates who were members of political parties. The district court had held the statute unconstitutional, relying on an earlier Supreme Court summary affirmance of a case arising out of Pennsylvania. The district court was held to have erred by relying too heavily on the summary affirmance when the factual issues presented in the two cases were different. The fact that in Pennsylvania there was also a requirement that signatures had to be gathered within a twenty-one day period prior to the deadline was pointed out as a "distinguishable" fact because of the increased burden. Id. at 177. This Court remanded for further fact-finding regarding the actual burdens imposed

by the Maryland statute. Id. at 178 - 179.

The fact that there was a trial in this case and only a short preliminary injunction hearing in Gary-Northwest is extremely important. In Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979), this Court held that the district court was not bound by the Supreme Court's summary affirmance of Jackson v. Ogilvie, 403 U.S. 925 (1971), stating:

> ...the issue [in Jackson] was by no means adequately presented to and necessarily decided by this Court. Jackson therefore has no effect on the constitutional claims advanced by appellees.

(emphasis added) 440 U.S. at 183.

The situation presented in the instant case is analogous to Mandel, Fusari, and Illinois State Board of

Elections. The Akron ordinance is much more restrictive than the Indiana law. The constitutional issue was not thoroughly considered in Gary-Northwest, nor was there review by a circuit court of factual findings after a trial on the merits.[21/] For these reasons, this

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21/ A Supreme Court case decided two days after Gary-Northwest emphasizes the different standards involved in granting preliminary and permanent injunctions. University of Texas v. Camenisch, 451 U.S.___, 68 L.Ed.2d 175 (1981). This Court rejected a suggestion that a determination of the likelihood of success on the merits is tantamount to a decision on the merits:

> This reasoning fails, ... because it improperly equates 'likelihood of success' with 'success,' and what is more important, because it ignores the significant procedural differences between preliminary and permanent injunctions. Id. at 180.

In light of these considerations, this Court found it "generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits." Id. at 180. This Court in Camenisch remanded for a full hearing on the merits.

Court should grant plaintiffs' petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant the cross-petition for a writ of certiorari and summarily reverse the judgment below. In the alternative, certiorari should be granted, and the Court should vacate the judgment below and remand for reconsideration in light of Mandel

v. Bradley, or set the case for full argument.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 80-1130 and 80-1530

Appeals from the United States
District Court for the Western
District of Missouri

Supplemental Opinion
to 655 F.2d 848

No. 80-1130.

Planned Parenthood Association of Kansas City, Missouri, Inc., Naim S. Kassar, M.D., Reproductive Health Services, Allen S. Palmer, D.O.,

Appellees,

v.

John Ashcroft, Attorney General of State of Missouri, Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri,

Appellants.

No. 80-1530.

Planned Parenthood Association of Kansas City, Missouri, Inc., Naim S. Kassar, M.D. Reproductive Health Services Allen S. Palmer, D.O.,

Appellants.

v.

John Ashcroft, Attorney General of State of Missouri, Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri,

Appellees.

Submitted: November 17, 1980

Filed: November 30, 1981

Before LAY, Chief Judge, HENLEY, Circuit Judge, and HARRIS,* Senior Judge.

LAY, Chief Judge.

This supplemental opinion is necessitated by reason of our previous certification to the district court relating to two issues. In our original opinion, we vacated the district court's finding that the hospitalization requirement for

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*Oren Harris, Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

second trimester abortions, under section 188.025 of the Missouri statutes, is unconstitutional. We remanded that issue to the district court for further proceedings and findings as to whether the hospitalization requirement is a substantial burden on a woman's decision to have an abortion and, if so, whether the state has shown a compelling state interest which justifies the requirement. We also vacated the district court's finding that the state may require a physician to file postabortion complication reports under section 188.052.2 and remanded this provision for reconsideration in view of the argument made by the parties.

In accord with our certification the district court took additional evi-

dence[1] and made further findings regarding the statute's hospitalization requirements for all second trimester abortions.[2]

The district court, the Honorable Elmo B. Hunter presiding, found: (1) only one hospital in Missouri currently

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1/Further evidence was taken on these issues in a hearing conducted on August 6-7, 1981. At that hearing, plaintiffs elicited testimony from Judith A. Widdicombe, President and Executive Director of Reproductive Health Services; Wayne Schramm, Director of the Bureau of Health Data Analysis of the Missouri Division of Health; Dr. Stanley Henshaw, Senior Research Associate at the Alan Guttmacher Institute; and Dr. Samuel G. Eubanks, Jr., a board certified specialist in the fields of obstetrics and gynecology. Defendants presented no testimony at this hearing, but at its conclusion did introduce into evidence the deposition of Dr. Willard Cates, taken on July 21, 1981, in Atlanta, Georgia. The deposition of Dr. Cates was duly received by the court.

2/Section 188.025 states:

> Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

Mo. Ann. Stat. § 188.025 (Vernon).

performs second trimester dilatation and evacuation (D&E) procedures; (2) second trimester D&E procedures performed in a hospital are generally significantly more expensive than the same procedures performed in an outpatient facility; and (3) requiring all second trimester abortions to be performed in a hospital results in fewer second trimester procedures being performed than if hospitalization was not required. As a result, the safest post-12 week abortion technique currently available, is an alternative which is not available to many pregnant women in Missouri. On this basis Judge Hunter found that section 188.025 creates a substantial interference with and imposes a direct burden on a woman's decision to have an abortion.

I. Second Trimester Hospitalization Requirement.

Section 188.025 requires that second and third trimester abortions be performed in a hospital. Mo. Ann. Stat. § 188.025 (Vernon). If state legislation creates substantial interference with and imposes a direct burden on a woman's decision to have an abortion, then the state requirement is to be evaluated to determine if it reasonably relates to the state's interest in maternal health. Roe v. Wade, 410 U.S. 113, 164 (1973); Planned Parenthood Ass'n v. Ashcroft, 655 F.2d 848, 854 (8th Cir. 1981).

This court concluded previously, and additional evidence presented to the district court reinforces the conclusion, that D&E is the most used and safest pro-

cedure for second trimester abortion. Ashcroft, 655 F.2d at 855.

At the original trial of this action, the district court concluded that second trimester D&E was available only in one hospital in Missouri. That conclusion rested solely on the personal knowledge of two physicians, neither of whom testified that he was familiar with the policies of the hospitals throughout the state. However, evidence presented at the evidentiary hearing persuasively corroborates the district court finding.[3/] The state did not dispute that

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3/Wayne Schramm, the Director of the Bureau of Health Data Analysis for the Missouri Center for Health Statistics, testified that in 1981 his office began to record second trimester abortions by the D&E method. Only one hospital reported performing any second trimester abortions by the D&E procedure. This is the same hospital, Truman of Kansas City, reported in the previous proceedings before the court.

[footnote continued]

any hospital other than Truman Medical Hospital has performed or is willing to perform second trimester abortions using the D&E procedures.

The record demonstrates that hospitalized D&E's are more expensive than nonhospitalized D&E's. There exists evidence that some hospitalized second trimester D&E procedures are twice as

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[footnote 3 continued]

Stanley Henshaw, Senior Research Associate at the Alan Guttmacher Institute, which collects and analyzes abortion statistics on a state-by-state basis, testified that in 1979 and 1980, three hospitals reported one or more second trimester abortions by any method. The Kansas City hospital did more than 99 per cent of all second trimester abortions in those two years. One hospital reported one second trimester abortion in each of those two years; the other reported three abortions in each of the two years. He testified that the Institute inferred that those latter two hospitals are not really making abortion services available to women given the infrequency of second trimester abortions at those two hospitals.

expensive as nonhospitalized D&E procedures.[4/] The district court concluded from the evidence that requiring hospitalized second trimester abortions places a financial burden on many women seeking such abortions.[5/] On the basis

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4/Dr. Samuel G. Eubanks, Jr., a practicing physician in Louisville, Kentucky, specializes in obstetrics and gynecology. He practices in an office that has performed 15,500 abortions since 1976; he personally has performed approximately 1,400 second trimester D&E's. He testified that in Kentucky the average cost of a nonhospitalized second trimester abortion was about one-half the cost of what it would be in the hospital.

In the original proceedings, witnesses testified that the increase in the cost burden to the woman of obtaining second trimester D&E's in hospitals, rather than clinics, runs from $150.00 to $1,650.00.

5/During the period when all second trimester abortions were required to be performed in hospitals, 540 procedures were performed. In 1980, when that requirement was removed, the total number of second trimester procedures performed in Missouri was 1,390, 700 of which were performed in hospitals and 690 of which were performed in outpatient facilities. Dr. Henshaw testified that Missouri met only 13 per cent of the perceived need for second trimester abortions in

[footnote continued]

of the record presented, this finding is not clearly erroneous.

Since section 188.025 creates a substantial interference with and imposes a direct burden on a woman's decision to have an abortion, the state

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[footnote 5 continued]

the state in 1979; however, it met 34 per cent of the perceived need in 1980. In 1980, there were two second trimester abortion providers in the state, Truman Medical Hospital of Kansas City and Reproductive Health Services of St. Louis, a clinic. In 1979, only Truman Medical Hospital provided second trimester abortions. Dr. Henshaw would not infer that Reproductive Health Services substantially met all the need for second trimester abortions in the St. Louis area. Dr. Henshaw also testified that nationally 9 per cent of all abortions performed were second trimester abortions. In 1979, 3.4 per cent of all abortions performed in Missouri were second trimester abortions, but in 1980, when abortions could be performed in outpatient clinics, the figure was 6.9 per cent.

Dr. Eubanks also testified that the higher cost of hospitalized second trimester D&E procedures placed a financial burden on many patients seeking abortions.

has the burden of showing that Missouri's requirement reasonably relates to the protection of the woman's health. As we stated in our previous decision, the state must show that nonhospitalized D&E procedures can reasonably be considered more dangerous than hospital procedures, including hospitalized D&E. Ashcroft, 655 F.2d at 856.

The central issue is the relative safety of nonhospitalized D&E and hospitalized methods. No quantitative studies are cited which directly compare the relative safety of the two procedures. However, the district court has found explicitly that a nonhospitalized second trimester D&E procedure is just as safe as those second trimester D&E

procedures conducted in hospitals.[6/]

6/We are aware of the Sixth Circuit's decision in Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981). In Akron, the plaintiffs tried to show that because of the D&E procedure, abortion through the 17th or 18th week of pregnancy is safer than childbirth. Thus, they argued that, under Roe v. Wade, the state's interest in maternal health does not become compelling before that time and the requirement that all second trimester abortions be performed in hospitals is unconstitutionally overbroad.

In the district court, the plaintiffs presented evidence that early second trimester clinical abortions were just as safe as second trimester abortions performed in hospitals. The district court, however, did not find plaintiff's evidence so convincing that it was willing to discard the Supreme Court's formulation in Roe v. Wade.

The Sixth Circuit noted that two district courts held that the state's interest in the health of the pregnant woman does not become compelling until the 18th week of pregnancy. Margaret S. v. Edwards, 488 F. Supp. 181, 194-96 (E.D. La. 1980) and Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 687 (W.D. Mo. 1980). The Sixth Circuit found the rationale of these decisions persuasive. However, it also found that, by affirming Gary-Northwest Indiana Women's Services, Inc. v. Orr, ____U.S.____, 101 S.Ct. 2012 (1981), the Supreme Court had an opportunity to retreat from the "bright line" drawn in Roe v. Wade and declined to do so. Thus, it affirmed the district court's holding that the

[footnote continued]

Since the district court's finding is not clearly erroneous, we find that non-hospitalized second trimester D&E procedures are no more dangerous to maternal health than hospitalized procedures.

[footnote 6 continued]

statute was constitutional.

Evidence adduced at the original trial in this cause and the evidentiary hearing suggests that the nonhospitalized procedures may actually be safer. The evidence cited in the original opinion is noted by this court in Ashcroft, 655 F.2d at 857 n.12. At the evidentiary hearing, Dr. Willard Cates, Chief of the Abortion Surveillance Branch of the Family Planning Evaluation Division at the Center for Disease Control, stated that in his opinion D&E procedures through 16 weeks after the last menstrual period (14 weeks after conception) are just as safe in outpatient facilities as they are in hospitals. The district court views the testimony of Dr. Cates to say that section 188.025 prevents D&E procedures, particularly in the 15th and 16th weeks after the last menstrual period. Also, the district court concluded that, even though testimony tended to show that hospitals are better equipped to treat postabortion infections, such infections do not occur until 24 to 72 hours after the procedure is completed. By that time a patient will have been dismissed from either a hospital or an outpatient facility.

Consequently, we hold that section 188.025 is not reasonably related to maternal health and, therefore, the requirement that all second trimester abortions be performed in hospitals is unconstitutional. See Planned Parenthood v. Danforth, 428 U.S. 52, 76 (1976).

II. Recordkeeping.

Subsection 188.052.2 of the Missouri statutes requires physicians to complete individual complication reports.[7] Plaintiffs argue that a physician may be faced in completing these

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7/Subsection 188.052.2 states:

An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such postabortion care. This report shall include:

(1) The date of the abortion;

(2) The name and address of the abortion facility or hospital where the abortion was performed;

(3) The nature of the abortion complication diagnosed or treated.

Mo. Ann. Stat. § 188.052.02 (Vernon).

reports with the situation where the patient will not or cannot provide the necessary information. Plaintiffs argue that the physician is then faced with the dilemma of filing a report with incomplete data, thereby subjecting himself to criminal liability, or refusing to treat the patient.

The district court was not convinced that a reasonable interpretation of subsection 188.052.2 would place physicians in the dilemma envisioned by plaintiffs. The court interprets the statute to require physicians to complete the reports using data that is reasonably available to them. That interpretation is shared by the Missouri attorney general. Since physicians are required only to report information that is reasonably available to them, section

188.052.2 does not place physicians in the dilemma of refusing treatment to patients or subjecting themselves to criminal liability by filing an incomplete report when the patient refuses to or cannot provide data to be included in the postabortion complication report.

The reporting requirement is not subject to strict scrutiny analysis, as there are no suspect classifications or fundamental rights at stake. The reporting requirement need only be rationally related to a constitutionally permissible purpose. The district court, finding that the reporting requirements are consistent with the holding of Planned Parenthood v. Danforth, supra, ruled that it is rationally related. The requirements of subsection 188.052.2 provide the state with information that

is helpful to medical assistance, judgments, and medical standards. Thus, it is also reasonably related to the state's interest in protecting maternal health. Connecticut v. Menillo, 423 U.S. 9, 10-11 (1975); Roe v. Wade, 410 U.S. at 164.[8/]

III. Conclusion.

We affirm the district court's finding that the requirement of hospitalization for second trimester abortions under section 188.025 is unconstitutional. We affirm the district court's finding that a state may require a physician to file postabortion compli-

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8/Dr. Cates testified that keeping the type of statistics mandated by the statute has been shown to contribute to the safety of abortion procedures.

cation reports under subsection 188.052. These rulings shall be incorporated into our prior judgment, Planned Parenthood Ass'n v. Ashcroft, 655 F.2d 848 (8th Cir. 1981), and the integrated judgment as now amended shall issue.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

Indiana statute challenged in Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), aff'd mem. sub nom. Gary-Northwest Indiana Women's Services, Inc. v. Orr, 451 U.S.___, 101 S.Ct. 2012 (1981).

Ind. Code 35-1-58.5-2. ...Abortion shall in all instances be a criminal act except when performed under the following circumstances:

* * *

(b) After the first trimester of pregnancy and before viability, for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:

* * *

(2) It is performed in a hospital.

* * *

Ind. Code 35-1-58.5-1 [10-107]. Definitions. - As used in this chapter:

(a) The term "trimester" means any one of three [3] equal periods of time of normal gestation period of the pregnant woman in question derived by dividing such period of gestation into three [3] equal part [parts] of three [3] months each and to be designated as the first trimester, second trimester, and the third trimester, respectively.

(b) The term "abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

(c) The term "hospital" means:

(1) A hospital as defined in IC

1971, 16-10-1-6 as amended, which is required to be licensed by the state board of health as provided in IC 1971, 16-10-1 [16-10-1-1 - 16-10-1-19], or which is operated by an agency of the United States; or

(2) An ambulatory out-patient surgical center as defined in IC 1971, 16-10-1-6(b).

APPENDIX C

MINUTE ENTRY
November 18, 1981
COLLINS, J.

MARGARET S., ET AL	CIVIL ACTION
VERSUS	NO. 78-2765
DAVID C. TREEN, ET AL	SECTION "C"

****

This matter came on for hearing on November 18, 1981 on cross motions of both parties for summary judgment pursuant to Fed. R. Civ. P. 56. The parties seek a declaration from the Court on the constitutionality of certain provisions of Louisiana law regulating abortions. La. Rev. Stat. Ann. §40:1299.35.3 (West) Supp. 1981 provides:

> [n]o abortion performed or induced after the first trimester of pregnancy shall be performed or induced except in a hospital licensed under the provisions of R. S. 40:2100, et seq.
>
> La. Rev. Stat. Ann. §40:1299.35.5

(West. Supp. 1981) provides:

> [n]o physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of eighteen unless he first has received the written consent of at least one of the parents or the legal guardian of the minor unmarried woman or a court order.

Defendant also seeks summary judgment with respect to La. Rev. Stat. Ann. §40:1299.35.12, §40:1299.35.13 and §40:1299.35.15 (West. Supp. 1981). These provisions regulate the performance of abortions in emergency settings; fetal experimentation; and the disposal of fetal remains.

WHEREFORE, after due consideration of the arguments of counsel, the submitted memoranda, and the applicable law, the Court will and hereby does: (1) GRANT plaintiff's motion for summary judgment with respect to La. Rev. Stat.

Ann. §40:1299.35.3 requiring that post-first trimester abortions be performed in hospitals. The Court finds that summary judgment is appropriate since there are no issues of material fact as to this issue. The Court concludes that this provision is unconstitutional. Therefore, the Statute of Louisiana is hereby permanently enjoined from enforcing this statutory provision.

(2) GRANT defendant's motion for summary judgment with respect to La. Rev. Stat. Ann. §40:1299.23.5 requiring minors to obtain parental consent or a court order before obtaining an abortion. The Court finds that summary judgment is appropriate since there are no issues of material fact as to this issue. The Court has concluded that this provision is constitutional. Accordingly, the tem-

porary restraining order prohibiting the enforcement of this provision is hereby dissolved.

As to the remaining issues raised for summary judgment, the Court is of the opinion that it would be inappropriate to grant summary judgment at this time since disputed issues of material fact exist as to these issues.

The Court's rationale for these rulings will be included in a final opinion on the merits.

(Robert F. Collins)
UNITED STATES DISTRICT JUDGE

APPENDIX D

AMERICAN PUBLIC HEALTH ASSOCIATION

Resolution

Adopted

November, 1979

THE RIGHT TO SECOND TRIMESTER ABORTION

The American Public Health Association,

Recognizing that it has consistently advocated women's right to abortion (Resolution #7626), physicians' freedom to perform abortion, and state legislation for legal abortion (#6718); and has urged the removal of state statutes restricting abortion (#7118), and supported the inclusion of abortion in public funding (#7025);

Acknowledging that although the United States Supreme Court has recognized women's right to abortion to the point of viability in the 1973 Doe vs. Wade decision, antiabortion groups are

harassing women seeking abortions, as well as abortion providers across the country, and are creating immense pressure on physicians who perform later abortion procedures; and

Further while acknowledging the greater safety of first trimester abortions, it is recognized that women who seek later termination abortions are often treated disrespectfully by hospital personnel who oppose abortion; and

Noting that only 9 percent of legal abortions are performed in the second trimester of pregnancy; that greater use of the dilatation and evacuation procedure make it possible to perform the vast majority of second trimester abortions during or prior to the 16th week after the last menstrual period (LMP), which is the 14th week of pregnancy; and that most

women who seek abortions after the 16th week LMP are facing severe social and health circumstances, such as pregnancy at a very young age or involving a fetus with known serious congenital abnormalities or disease; and

Noting that through curtailment of funding at both the federal and state levels, poor women have seen their right to abortion erode; therefore

1. Renews its support of women's right to abortion up to and to the point of viability.
2. Urges strong opposition to local state proposed or enacted ordinances which present misleading and non-factual information which may be perceived to frighten and harass women who choose abortion and health care providers performing these a-

bortions.

3. Urges endorsement of educational programs which train physicians and health care personnel to provide safe later abortion techniques of Dilatation and Evacuation and saline infusion.

4. Urges endorsement of the provision of second trimester abortion in free-standing qualified clinics that meet the state standards required for certifications.

APPENDIX E

QUESTIONS PRESENTED

I. Whether the Three-Judge District Court Erroneously Treated the Supplemental Petition for Injunctive Relief from Judgment, When It had Never Entered a Final Judgment On the Merits of the Second Trimester Hospital Restriction in any Previous Proceeding?

II. Whether this Court Should Vacate the Judgment Below and Remand for a Full Hearing before the Entire Three-Judge Court on the Merits of the Second Trimester Hospital Restriction?

III. Whether the District Court Abused Its Discretion in Preliminarily Upholding The Second Trimester

Hospital Restriction, When the Overwhelming Majority of Indiana Hospitals Ban all Abortion Services, and there is no Compelling Health Reason for Mandatory Hospitalization?

PARTIES IN THE DISTRICT COURT

The caption identifies all of the parties in the lower court proceedings. The Brigitte Coe and Jane Doe classes seek no relief on this appeal.

APPENDIX F

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
CENTER FOR DISEASE CONTROL
ATLANTA, GEORGIA 30333
(404) 329-3131

October 14, 1980

Eve Paul, Esq.
Vice President, Legal Division
Planned Parenthood Federation of
America, Inc.
810 Seventh Avenue
New York, New York 10019

Dear Ms. Paul:

This letter responds to your request for my opinion regarding the performance of dilatation and evacuation (D&E) procedures at 13 weeks' gestation or later in non-hospital facilities.

Although comparative data are not available to evaluate the safety of uterine evacuation procedures performed at 13 weeks' gestation or later in

either hospital or non-hospital facilities, case-series reports have documented that some operators can safely perform uterine-evacuation procedures at 13-16 weeks in ambulatory clinics (1, 2). This decreases the cost and inconvenience to the patients and eliminates the unnecessary use of hospital beds. Currently most D&E procedures performed at 13 weeks' gestation or later are being performed in the 13-16 week interval. It is my expert opinion that the vast majority of D&E procedures in this interval are being performed in non-hospital facilities. Available data show that approximately one-third of all abortion procedures performed at 13 weeks' gestation or later are in non-hospital facilities (3), and most of these are presumably D&E procedures.

Sincerely yours,

Willard Cates, Jr., M.D., M.P.H.
Chief, Abortion Surveillance Branch
Family Planning Evaluation Division
Bureau of Epidemiology

1. Burnhill MS: Vaginal second-trimester abortion. In Sciarra JJ, et al (eds.): Risks, Benefits, and Controversies in Fertility Control. Hagerstown, Maryland, Harper and Row, 1978, pp 331-347.

2. Hern WM, Oakes AG: Multiple laminaria treatment in early mid-trimester outpatient suction abortion: A preliminary report. Adv Plan Parent 12:93-97, 1977.

3. Forrest JD, Sullivan E, Tietze C: Abortion in the United States, 1977-1978. Fam Plann Perspect 11:329-341, 1979.

Supplemental Brief

No. 81-1172

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,
Petitioners,

—v.—

CITY OF AKRON, *et al.*,
Respondents.

PETITIONERS' SUPPLEMENT TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ARGUMENT

I. THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS RECENTLY APPROVED THE PERFORMANCE OF EARLY SECOND-TRIMESTER ABORTIONS IN FREE-STANDING CLINICS.

Petitioners filed their cross-petition for a writ of certiorari on December 19, 1981. Petitioners now provide this Court with a supplemental brief pursuant to Rule 22.6 because on January 5, 1982, Dr. Ervin E. Nichols, Director-Practice Activities of the American College of Obstetricians and Gynecologists (ACOG) notified petitioners that ACOG had approved a new edition of its Manual of Standards for Obstetrical-Gynecological Services. (Dr. Nichols' letter is reproduced as Appendix A, p. 1a.) The new edition of the ACOG Manual of Standards replaces the edition issued in 1974.

The 1974 edition of the ACOG Manual stated that "[a]bortions beyond the first trimester should be performed in a hospital." (The relevant section of the 1974 ACOG Manual of Standards is reproduced as Appendix C, p. 6a.) By contrast, the new edition of the ACOG Manual states:

> "Generally, abortions in the physician's office of outpatient clinic should be limited to 14 weeks from the first day of the last menstrual period. In a hospital-based or in a free-standing ambulatory surgical facility, or in an outpatient clinic meeting the criteria required for a free-standing surgical facility, abortions should be limited to 18 weeks from the last menstrual period."

(The relevant section of the 1982 ACOG Manual of Standards is reproduced as Appendix B, p. 3a.)

The significance of the change in the ACOG Manual for the present litiga-

tion is twofold. First, in the present case, the Sixth Circuit Court of Appeals cited the 1974 ACOG Standard as virtually the only proof offered by the respondents in support of the restriction imposed by the City of Akron requiring that all abortions after the first trimester of pregnancy be performed in a hospital accredited by the Joint Commission of Accreditation of Hospitals. See Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198, 1208 (6th Cir. 1981). The replacement of the 1974 ACOG Standard deprives the respondents of any factual basis upon which to justify their "in-hospital" rule.

Second, this Court in Roe v. Wade, 410 U.S. 113 (1973) recognized the importance of a change in the official position of a representative body of

the American medical profession with respect to abortion services. Id. at 141-46. The change made by ACOG reflects the medical community's acceptance of the performance of early second-trimester abortions in the clinical setting. Further, it should be noted that the brief of ACOG was relied upon by this Court in Doe v. Bolton, 410 U.S. 179, 193 n.13 (1973), as a source of information with respect to the attitudes of the medical community toward abortion-related issues. Under these circumstances, the change effected in the ACOG Manual of Standards for Obstetrical-Gynecological Services is of considerable importance in evaluating the validity of the respondents' outmoded "in-hospital" requirement.

CONCLUSION

For the foregoing reasons, as well as those previously presented, the Court should grant the relief sought by petitioners in their cross-petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

THE AMERICAN COLLEGE
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600 Maryland Avenue, S.W.
Washington, DC 20024
Telephone (202) 638-5577

January 5, 1982

Stephan Landsman, Esquire
Cleveland State University
Cleveland-Marshall College of Law
Cleveland, OH 44115

Dear Mr. Landsman:

The Executive Board of the American College of Obstetricians and Gynecologists has approved by written notification the new edition of the Manual of Standards for Obstetrical-Gynecological Services. Publication will follow shortly. This new edition will replace the 1974 edition.

A portion of the approved Standards regarding abortion services provided by ambulatory care facilities is enclosed

for your information. I hope that this particular excerpt will be helpful.

If you need further information or assistance, please do not hesitate to call.

Sincerely,

Ervin E. Nichols, MD
Director
Practice Activities

APPENDIX B

GYNECOLOGY - AMBULATORY CARE - Page 16

Abortion

Ambulatory care facilities providing abortion services should meet the same standards of care as those recommended for other surgical procedures performed in the physician's office and outpatient clinic or the free-standing and hospital-based ambulatory setting. Physicians performing abortions in their offices should provide for prompt emergency treatment or hospitalization in the event of an unanticipated complication. Clinics and free-standing ambulatory facilities should have written agreements with nearby hospitals for the transfer of patients requiring treatment for emergency complications of abortion procedures.

Generally, abortions in the physician's office or outpatient clinic should be limited to 14 weeks from the first day of the last menstrual period. In a hospital-based or in a free-standing ambulatory surgical facility, or in an outpatient clinic meeting the criteria required for a free-standing surgical facility, abortions should be limited to 18 weeks from the last menstrual period. Prior to abortion, the woman should have access to special counseling that explores options for the management of an unwanted pregnancy, examines the risks, and allows sufficient time for reflection prior to making an informed decision. If counseling has been provided elsewhere, the physician performing the abortion should verify that the counseling has taken place.

In addition to the usual and customary history, physical examination, and indicated laboratory procedures, an Rh factor determination should be made. Aspirated tissue should be examined to ensure the presence of villi or fetal parts prior to the patient's release from the facility. If villi or fetal parts are not identified with certainty, the tissue specimen must be sent for further pathologic examination, and the patient must be alerted to the possibility of an ectopic pregnancy.

Rh immune globulin must be administered to every unsensitized Rh(D) negative woman who has an abortion.

APPENDIX C

Abortion

Policies covering abortions should be designed by the medical staff to surgical procedure. For its performance, adequate facilities, equipment, and personnel are required to assure the highest standards of patient care.

First-trimester abortions (up to 12 weeks' gestational age) should be performed in a hospital or in a facility that offers the basic safequards provided by hospital admission and has immediate hospital back-up. Such a facility should be accredited by the Joint Commission on Accreditation of Hospitals or licensed by a state province.

Abortions beyond the first trimester should be performed in a hospital.

Facilities for the first-trimester abortions should include appropriate surgical, anesthetic, and resuscitation equipment. In addition, the following should be provided:

--Verification of the diagnosis and duration of pregnancy.

--Preoperative instructions and counseling.

--Recorded preoperative history and physical examination, particularly directed to identification of preexisting or concurrent illnesses or drug sensitivities that may have a bearing on the operative procedures or the anesthesia.

--Laboratory procedures as usually required for a hospital admission, including blood type

and Rh factor determinations.

--Prevention of Rh sensitization.

--A receiving facility where the patient may be prepared and receive necessary preoperative medication and observation before the procedure.

--A recovery facility in which the patient can be observed until she has sufficiently recovered from the procedure and anesthesia and can be safely discharged by the physician.

--Postoperative instructions and arrangements for follow-up, including family planning advice.

--Adequate permanent records.

It is recognized that although an abortion may be requested by a patient or recommended by a physician, the final decision as to performing the abortion must be left to the medical judgment of the pregnant woman's attending physician, in consultation with the patient. No physician should be required to perform, nor should any patient be forced to accept, an abortion.

The usual informed consent, including operative permit, should be obtained. The same indications for consultation should apply to abortions as to other medicosurgical procedures.

Abortion should be performed only by physicians qualified to identify and manage complications that may arise from the procedure.

The provision of abortion services should not interfere with the care of other obstetric-gynecologic patients or with residency training programs in obstetrics and gynecology. Consideration should be given by hospitals to providing facilities where abortions can be performed with minimal disruption of other hospital functions.

Opposition

No. 81-1172

Office - Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1981

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et. al.*,
Petitioners,

— v. —

CITY OF AKRON, *et al.*,
and
FRANCOIS SEGUIN, M.D., *et al.*,
Respondents.

RESPONDENTS' JOINT RESPONSE TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Should this Court reconsider its holdings in *Roe v. Wade, 410 U.S. 113 (1973)* and *Doe v. Bolton, 410 U.S. 179 (1973)* that a state's interest in maternal health becomes "compelling" at the end of the first trimester of pregnancy?

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INTRODUCTION

By letter dated January 29, 1982, respondents the City of Akron, et al. and Francis Seguin, M.D. and Patricia Black (hereinafter collectively referred to as respondents, and variously as "the City" or "the respondent parents") were informed of this Court's desire to receive a brief in opposition to the cross-petition for certiorari filed by Akron Center for Reproductive Health, et al. (hereinafter referred to as Akron Center or "the clinics") in No. 81-1172. Although all the respondents waived their rights to file an opposition to the petition in No. 81-1172 because they are of the opinion that the petition should be granted and the decision as to the second trimester hospital requirement, they do welcome the opportunity to provide the court with a statement of their views. At trial, the City intro-

duced evidence in support of the entire ordinance, but respondents Seguin and Black were not permitted to introduce evidence or examine witnesses on the issue raised by No. 81-1172. As parents of unemancipated minor daughters of childbearing age who reside in the City of Akron, respondents Seguin and Black have an interest in the enforcement of the ordinance at bar which extends far beyond that of a mere private citizen. Like the City of Akron's compelling, general interest in the health and safety of its citizens, the health and safety of their own children is protected by this ordinance.

RELATED CASES

Respondents, the City of Akron, its mayor, director of public health, and prosecutor, are petitioners in *City of Akron* v. *Akron Center for Reproductive Health, No. 81-746.* They are respon-

dents in the instant case and in No. 81-854, *Seguin and Black v. Akron Center for Reproductive Health, et al.* Respondents Seguin and Black are petitioners in No. 81-854, *Seguin and Black v. Akron Center for Reproductive Health, et al.*, and respondents in No. 81-746, *City of Akron v. Akron Center for Reproductive Health* and in the instant case.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE CONFLICT AMONG THE CIRCUITS LED THESE RESPONDENTS TO WAIVE THEIR RIGHT TO FILE AN OPPOSITION TO THE CROSS-PETITION FOR CERTIORARI FILED BY THE CLINICS.

In the view of the respondents, the issues raised in this case, as well as in Nos. 81-746 and 81-854, are of sufficient importance that this Court should grant certiorari in all three pending cases to review the entire decision of the Court of Appeals for the Sixth Circuit. Respondents will argue

in this opposition to Akron Center's petition that the decisions below were correct, both on their facts and on the law. They further submit that decisions reaching or suggesting a contrary conclusion, including those of the Fourth and Eighth Circuits, *see Planned Parenthood Association of Kansas City* v. *Ashcroft, 655 F.2d 848 (8th Cir. 1981), on petition 81-1255, (U.S. pending) Nos. 80-1130 and 80-1530 (8th Cir. November 30, 1981)* and *Simopoulos* v. *Virginia State Board of Pharmacy, 644 F.2d 321, (4th Cir. 1980) No. 80-1431, related case pending in this court sub nom, Simopoulos* v. *Commonwealth, No. 81-185 (U.S. pending) on petition from 221 Va.2d 1059, 277 S.E.2d 194 (1981)* are wrongly decided.

II. THE DECISION OF THIS COURT IN *GARY-NORTHWEST INDIANA WOMEN'S SERVICES V. ORR, 451 U.S. -, 101 S.Ct. 2012 (1981)* (mem) SHOULD BE REAFFIRMED.

This Court's summary affirmance of *Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 421 F.Supp. 734 (N.D. Indiana 1976)*, aff'd. 429 U.S. 1067 (1977), 496 F.Supp. 894 (N.D. Indiana 1980) (on motion to reopen the judgment) aff'd mem, sub nom, *Gary-Northwest Indiana Women's Services v. Orr, 451 U.S. 934, 101 S.Ct. 2012(1981)* [hereinafter *Gary-Northwest*], was correct as a matter of law and should control the outcome of this action. Although the Indiana statute involved in *Gary-Northwest* provided for the performance of abortions in free-standing ambulatory surgical facilities as well as in hospitals, it was the second trimester dividing line -- not the authorized locations -- which was at issue in that

case. To that extent, *Gary-Northwest* controls this case.

Cross-petitioners' description of the *Gary-Northwest* case, therefore, attempts to create a difference where none exists. Both the Indiana statute involved in *Gary-Northwest* and the Akron ordinance at bar regulate the *place* where second trimester abortions may be performed. Not surprisingly, the arguments made by the plaintiffs in *Gary-Northwest Women's Services* were nearly identical to those made in the instant case. In *Gary-Northwest*, he District Court summarized them as follows:

> "The plaintiffs' arguments are as follows: (1) only one Indiana hospital . . . will allow the use of its facilities for the performance of non-therapeutic second trimester abortions; (2) Some indigent women cannot afford the expense of traveling to [this hospital] . . .; (3) Indiana's requirement that all second trimester

> abortions be performed in a hospital therefore requires some indigent women to bear a child rather than acquire a non-therapeutic second trimester abortion; (4) Childbirth is more dangerous to a mother's health than a second trimester abortion, if the abortion is performed during approximately the first half of the second trimester pregnancy, and if the dilation and evacuation [D & E] method is used; (5) Therefore, Indiana's hospitalization requirement forces some indigent women to pursue a course of action which is more dangerous to their health than the course of action which they would pursue in the absence of Indiana's hospitalization requirements; (6) Therefore, Indiana's hospitalization requirement does not "reasonably relate to maternal health" and is accordingly unconstitutional.(citation omitted)" *Gary-Northwest Indiana Women's Services, Inc. v. Bowen, supra, 496 F.Supp. at 899-900.*

In the case at bar, the arguments made by cross-petitioner differ only in that there is no focus on indigency:

> "[C]urrent medical data prove that the performance of second trimester D & E abortions in out-patient facilities is widely accepted in the medical community, and that this practice is as safe as, or safer than, in-hospital procedures. Second trimester D & E abortions are not only twice as safe as the earlier methods, they are much safer than childbirth. (citation omitted) Futhermore, as the Sixth Circuit found, the blanket prohibition imposed by Section 1870.03 causes severe limitations on access, exposing women to far greater health risks than if physicians were allowed to perform the less-costly D & E abortions in clinics. (citation omitted)" *Cross-petition of Akron Center for Reproductive Health, et al. for certiorari, No. 81-1172 at 25-26*

Given this identity of issues, the reasons why this Court should grant the writ and affirm the judgment below on this case are the same as those mentioned by Judge Sharp in *Gary-Northwest* and later affirmed by this Court:

"To adopt [this] theory and hold [the] hospitalization requirement unconstitutional because of its impact on non-therapeutic early second trimester D & E abortions would ultimately require that the second trimester be split for purposes of determining the constitutionality of regulations. Such a holding would require states to adopt, for their maternal health regulations, some cutoff other than the end of the first trimester.

* * *

Interpreting *Roe* to require that second trimester regulations except specific types of abortions which may be safer than childbirth would require re-litigation of the regulation's constitutionality with each change in the availability of abortions, with each improvement in abortion technique, and with each publication of statistics showing that abortion skills have improved. Such an interpretation would result in repeated re-litigation of the constitutionality of the same statute. It is the policy of the Supreme Court to avoid, if possible, the creation of rules of law which increase litigation. *Roe* should not be given an interpretation which results in repeated re-litigation of a statute's constitutionality. *Roe* does not render the consti-

> tutionality of second trimester regulation subject to either the availability of abortions or the improvements in medical techniques and skills.
>
> The test for determining the constitutionality of statutes regulating second trimester abortions is not whether the statute has the statistically demonstrable result of decreasing maternal morbidity or mortality for specific groups of abortions. . . . The ultimate test is a broader test: whether the legislature acted reasonably in determining that the regulation would promote maternal health. . . . A statutory regulation of second trimester abortions is constitutional if it was reasonable for the state to conclude that the regulation would promote maternal health. *Gary-Northwest Indiana Women's Services v. Bowen, supra, 496 F.Supp. at 896-97, 899, 901-902.*

If, as stated in *Roe v. Wade, 410 U.S. 113 (1973)*, the state's interest in the protection of maternal health becomes compelling at approximately the end of the first trimester, the role of the judiciary is at an end once it has

been determined that the Akron City Council has taken a reasonable approach preserving its compelling interest in maternal health. Examination of the record in this case convincingly demonstrates that the approach it has taken is both reasonable and necessary, and that what cross-petitioners are really seeking is modification of this Court's holding in *Roe v. Wade*.

III. THE EVIDENCE BELOW SUPPORTS A REFUSAL BY THIS COURT TO INTERFERE WITH WHAT IS ESSENTIALLY A LEGISLATIVE JUDGMENT.

1. Second Trimester Abortions Are Available in Akron as Well as in the Akron-Canton-Youngstown-Cleveland Metropolitan Area.

Although the clinics rely heavily on *Planned Parenthood Association of Kansas City, Inc. v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) on petition No. 81-1255 (U.S. pending)* (Cross-petition for certiorari at 1a-18a), to support

their position here that case struck down a hospital requirement contained in the Missouri statute which had a significant impact on the availability of second trimester abortions. In *Ashcroft* the clinics were able to prove that only one hospital in Missouri performed second trimester D & E abortions. Cross-petition for Certiorari 4a-5a. In this case, the record is clear that the second trimester hospital requirement contained in the Akron ordinance does not even limit the availability of second trimester abortions in the City of Akron.

As the Sixth Circuit noted, there was unrebutted testimony in the record that *two* hospitals in Akron were available for second trimester abortions, and that women were also routinely referred to clinics in Cleveland and Michigan for later-term abortions. 651

F.2d 1198, 1209, (6th Cir. 1981) J.A. 19a. The clinics in this case advertise over a wide area of Northeastern Ohio[1] (Tr. Vol. VI at 101) (Canton, Youngstown and Warren newspapers), and patients are referred to Akron Center's clinic from as far away as Mansfield and Columbus. (Tr. VI, 103-104) (noting referrals from Cleveland, Akron, Canton, Youngstown, Mansfield, Columbus and neighboring Kent State University) *See also, Akron City Hospital v. Anderson, 68 Ohio Misc 14 (Akron Municipal Court, 1981)* (reporting a second trimester abortion performed on a 15-year-old minor at the request of her mother on or

---

[1] This Court may take judicial notice that the city of Akron is physically located in the populous Northeast-Ohio area. The cities of Cleveland, Canton and Youngstown/Warren are but a short drive to Akron from the north, south and east respectively.

about August 23, 1978, less than two weeks prior to the date the trial before the District Court in this action began). Likewise, there is no evidence on the record that second trimester abortions are not available and being performed at area hospitals or other facilities in the Akron area, but outside the city limits of Akron itself.

2. *The Evidence Available to the Akron City Council at the Time this Ordinance Was Enacted Supports the Second Trimester Hospital Requirement.*

Although the clinics make much of the purported safety and community's "need" for mid-trimester D & E abortions, neither their safety nor anyone's "need" to have these clinics perform them is clearly established on this record. At the time of trial, defense expert Dr. Schmidt, past president of the American College of Obstetricians and Gynecologists [ACOG] and former

chairman of its Professional Standards Committee, testified that second (mid-) trimester abortions should be performed in hospitals (Tr. X, 29).

He did not believe, as these clinics seem to argue, that the safety of such procedures is clearly established for all clinics because a recognized source of medical data may have reported a good safety record. (Tr. X, 47). When pressed, he stated flatly that, as of the time of trial:

> "I can assure you that there is no change in the attitude of the College [ACOG] toward that recommendation, that mid-trimester abortions should be done in a hospital." (Tr. X, 47)

In an attempt to get around this evidence, the clinics attempt to show that the D & E procedure is so "safe" that this Court should abandon the *Roe* v. *Wade* "trimester" approach and adopt

the theory rejected by both this Court and the District Court in *Gary-Northwest Indiana Women's Services, supra*. Examination of these purported safety "facts" demonstrates, however, that none of them are sufficiently convincing to form the basis of a new constitutional rule which should supplant that of *Roe*. Equally telling is that all of the evidence supporting the alleged "safety" of non-hospital D & E abortions adduced in *this* case rests on assumptions concerning the availability of ancillary medical support services and the quality of in-hospital abortions. Those assumptions, however, find no support on this record. (*See, e.g.*, J.A. 94) (assuming less experienced physicians operate in a hospital rather than a clinic setting)

As the record and appendices in this case make clear, it is not the particular abortion technique which makes a

given abortion "safe," but the entire range of services and safety procedures in place and offered at a given clinic. The clinics' own supplemental brief in support of their cross-petition for certiorari contains the 1982 A.C.O.G. guidelines for "ambulatory care facilities providing abortion services". (App. B to Supplemental Brief of Cross-Petitioners at 3a) Those standards do not even *mention* D & E abortions. Neither do they purport to opine on their alleged "safety." Instead, they approach the *entire* question of abortion safety (including that of those performed in the first trimester) from a perspecti e which focuses on the preservation of maternal health. *But cf., Roe v. Wade, 410 U.S. 113 (1973)* (maternal health concerns not "compelling" until end of first trimester). The 1982 A.C.O.G. guidelines provide:

> *That clinics should have written transfer agreements with nearby hospitals for the transfer of patients needing emergency treatment.* Cross-petition, Supplemental Brief at 3a.) (emphasis added).

In the case at bar, the only evidence in the record concerning the treatment of an emergency case is one involving a minor who was sent to the hospital emergency room -- in her sister's car -- because the physician felt someone should see her. Notably, he himself never bothered to stop by the hospital to see her. (Tr. VI, 134) Although this ordinance does not require that a clinic have a written transfer agreement, such statutes have been held to be unconstitutional. *Hallmark Clinic v. North Carolina Department of Human Resources, 519 F.2d 1315 (4th Cir. 1975) aff'g 380 F.Supp. 1153, 1158 (E.D.N.C. 1974)* (requirement termed as a "thinly

disguised effort to evade *Roe* and *Doe*"); *Friendship Medical Center, Ltd. v. Chicago Board of Health*, 505 F.2d 1141 (7th Cir. 1974); *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974); *Birth Control Centers, Inc. v. Reizen*, 508 F.Supp. 1366 (E.D. Mich. 1981); *Women's Medical Center of Providence v. Cannon*, 463 F.Supp. 531 (D.R.I. 1978). But cf., *Westchester Women's Health Org., Inc. v. Whalen*, 475 F.Supp. 734 (S.D.N.Y. 1979).

> *A clinic should provide "specialized" counselling which "explores the options for the management of an unwanted pregnancy, examines the risks, and allows sufficient time for reflection prior to making an informed decision.* (Cross-petition, supplemental brief at 4a) (emphasis added)

In the case at bar, Section 1870.06 (B), provides for "specialized" counselling regarding physiology, risks, and options. Section 1870.07 provides for a

24-hour waiting period between counselling/consent and the actual abortion. Both were struck down. For these clinics to cite an A.C.O.G. standard which supports the ordinance at bar highlights the narrow view of "safety" they appear to have.

As the record shows, these clinics assume that all women who come to their facilities have decided to have an abortion. (Tr. VII, 51-54) (Dr.C.) They consider the information contained in Section 1870.06(B) regarding risks, options, and anatomical facts to be "irrelevant" (Tr. VI, 121-122). The requirement that the physician personally determine that the consent is informed is "burdensome", and the "specialized" counselling recommended by A.C.O.G. is provided -- not by the physician -- but by non-college graduates with no specialized training who are

supervised by the clinic director, a non-physician. (Tr. VII, 9)

The Sixth Circuit held below that a requirement that the physician make sure that the consent is truly informed is a violation of the woman's right to privacy and the "undesired and uncomfortable straightjacket" to which this Court referred in *Danforth, supra*. (App. to Petition for Writ of Certiorari, No. 81-746 at 95a-96a), but the A.C.O.G. recommends that the "physician performing the abortion should verify that the [suggested] counselling has taken place" (Supplemental Brief of Cross-petitioners at 4a). Even more importantly, the record demonstrates that 1) the physicians at these clinics do not spend enough time with each patient to verify the extent and quality of the counselling; 2) they are paid on a per/patient basis (i.e. they do not get paid for the time

spent unless the abortion is performed) (Tr. VI, 97); and 3) they do not supervise the counsellors or control the content of counselling practice (Tr. VII, 9). The patients do not even know the physician's name when they come to the clinic! (Tr. VI, 113) ("They [the patients] know that the physician is a real doctor, because all patients ask if we have real doctors, but they don't know the name of the doctor.")

In short, these clinics do not even meet the standards that they themselves cite as support for their claim that mid-trimester D & E abortions may "safely" be performed at their facilities.

3. *The Right of These Clinics to Offer Second-Trimester D & E Abortions is Not a Constitutional Question.*

Respondents submit that this case should be seen for what it is: an

attempt by the clinics to obtain judicial permission to offer medical services already available in the community by asserting the financial interests of unnamed, potential patients who may desire early second trimester abortions.[2]

The financial and administrative arguments made by the clinics are not of constitutional dimension. This Court has squarely rejected the contention that states are obligated to make abortions available, or that the commands of

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[2] It is notable that the clinics' standing to raise the constitutional rights of patients in this case is derivative, *see Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Singleton v. Wulff, 428 U.S. 944 (1977).* No pregnant woman desiring a second trimester abortion was a plaintiff in this case, and the only physician who has undertaken to challenge the ordinance at bar resides in and performs most of his work in Cincinnati, a city nearly 300 miles away to the southwest.

(Footnote continued on next page.)

constitution change as abortionists become more adept at performing their tasks quickly and cheaply. Most recently, in *H. L. v. Matheson, -U.S. -, 101 S.Ct. 1164, 1173 (1981)*, this Court held that "[t]he Constitution does not compel a State to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action 'encouraging childbirth except in the

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(Footnote 2 continued.)

Thus, the only parties fully interested in the outcome of this action are the corporate petitioners themselves. As such, their interest in the outcome of this action is purely financial, and the appropriate standard of review of their claim regarding economic regulations is "any rational basis". *See Williamson v. Lee Optical Company, 348 U.S. 483, 488-491 (1955)* Judge Kennedy's partial dissent in the Sixth Circuit recognized this point when she noted that "[t]he evidence presented at trial showed that the decision to terminate a pregnancy was made not by the woman in conjunction with her physician, but by the woman and lay employees of the abortion clinic, the income of which is dependent upon the woman's choosing to have an abortion." (Appendix to Petition for Certiorari, No. 81-746 36a)

most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life.' *Harris* v. *McRae*, *448 U.S. at -, 100 S.Ct. 2671, 2691-92. Accord, Maher* v. *Roe*, [*432 U.S. 464*], *473-474, 97 S.Ct.* [*2736*] *at 2382." See generally, West Side Women's Services* v. *City of Cleveland, 450 F.Supp. 796, 798 (N.D. Ohio 1977), aff'd. mem., 582 F.2d 1281 (6th Cir., 1978) (zoning restriction).*

In the case at bar, the City of Akron rationally concluded, based on information available in the community at the time the ordinance was passed as well as at the time of trial, that second trimester abortions are more safely performed at hospitals. Taken together with the weight of expert opinion available at the time supporting the second trimester hospital require-

ment, the second trimester requirement challenged in this case is clearly constitutional.

IV. THE RELATIVE "SAFETY" OF VARIOUS ABORTION PROCEDURES AND THE "NEED" FOR SUCH SERVICES IN A GIVEN COMMUNITY ARE NOT JUDICIAL QUESTIONS.

A. The Maternal Health Interest Is "Compelling" At All Stages Of Pregnancy.

Although the clinics in the present case make much of the alleged "safety" of the D & E method of abortions, the courts below "did not find plaintiffs' evidence on this issue so convincing" that they would be willing to discard this court's holding in *Roe* v. *Wade*. *410 U.S. 113 (1973)*. Since the decision in *Roe*, however, the federal courts have found themselves embroiled in what are essentially legislative disputes over the relative safety of given abortion procedures, *see e.g., Planned Parenthood of Kansas City* v. *Ashcroft*,

655 F.2d 848 (8th Cir. 1981) (Appendix to Cross-Petition for Certiorari at 1a-18a); the "need" for abortions in a given community or a given segment of the population, *compare, e.g., Harris v. McRae, 448 U.S. 297 (1980), rev'g. 491 F.Supp. 630 (E.D.N.Y. 1980); Poelker v. Doe, 432 U.S. 519 (1977) rev'g 515 F.2d 541 (8th Cir. 1976),* with *Nyberg v. City of Virginia, - F.2d -, 50 U.S.L.W. 2440 (8th Cir. filed Jan. 11, 1982) (requiring a municipal hospital to make its facilities available for paid abortions);* and the "substance" of the informed consent available to women who wish to obtain abortions. *See e.g., Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198 (6th Cir. 1981), cert. pending Nos. 81-746, 81-854 and 81-1172.* It is questionable whether any of these cases really involved the same kind of access

restrictions ruled unconstitutional in *Roe v. Wade, 410 U.S. 113(1973)* and *Doe v. Bolton, 410 U.S. 179 (1973).* In most of the cases cited, the only real question was either a disagreement over the "need" for the regulation involved (i.e. was it a "compelling" need), or the contention that certain segments of the population were in "need" of government-funded abortion services or facilities.

In the case at bar, the clinics were unable to prove that the Akron ordinance was intended to do anything but serve the valid health interests of the community. Abortion services are freely available either at these clinics, area hospitals, or facilities in nearby cities. There is, therefore, no need for "heightened" judicial scrutiny of any part of this ordinance unless it is first proved that its provisions act as

an effective access barrier like those in *Doe v. Bolton, 410 U.S. 179(1973)* and *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52(1976)* (ban on prostaglandin abortions held to restrict access to abortions). Thus, respondents urge that this case, like *Gary-Northwest Indiana Women's Services, supra,* be decided under the less rigorous "rational basis" test. The *Ashcroft* case, so heavily relied upon by the cross-petitioner clinics is simply wrong to the extent that the Eighth Circuit holds that a *finding* that "non-hospitalized second trimester D & E procedures are no more dangerous to maternal health than hospitalized procedures" (Cross-petition at 13a) supports a *holding* that a second trimester hospitalization requirement "is not reasonably related to maternal health." (Id. at 14a)

It should seem rather obvious that after *Doe v. Bolton, supra*, the term "safety", like the term "health", encompasses many factors. Among these are the qualifications of staff; the facilities available, standard operating procedures, and emergency plans. No court is qualified to rule, as a matter of law, that non-hospitalized D & E procedures are "safe." That decision should depend on the clinic and doctor involved, the "health" of the patient and many other factors unique to each case. Thus, if a non-hospitalized D & E is no *more* dangerous than a hospitalized one, it is arguable that reasonable minds can differ over the degree to which clinic abortions may be "as dangerous as" or "safer than" hospitalized abortions. Since it is certainly reasonable for the legislature to conclude that "no more dangerous than"

is equivalent to "just as dangerous."[3] The second trimester rule is "reasonably related to maternal health" as required by *Roe*.

When one considers the impact of the 1982 A.C.O.G. standards and the expert testimony in this record which supports the proposition that the relative "safety" of all abortions depends on the entire range and quality offered in the non-hospital setting, the dangers of judicial tampering with legislatively devised regulatory schemes on the basis of isolated statistics or less-than-unanimous medical opinion should be

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[3] The claim that a clinic D & E is "safer" than those performed in hospitals is extremely short-sighted. Serious complications, especially hemorrhage, occur with four to five times greater regularity after the fourteenth week of pregnancy. (Tr. X, 120) Such complications, especially hemorrhage, should be treated *in a hospital*. (Tr. X, 119) (Dr. Williams)

clear. They were well summarized in the dissenting opinion of Chief Justice Burger in *Eisenstadt v. Baird, 405 U.S. 438, 470 (1972):*

> The actual hazards of introducing a particular foreign substance into the human body are frequently controverted, and I cannot believe the unanimity of expert opinion is a prerequisite to a State's exercise of its police power, *no matter what the subject matter of the regulation.* Even assuming no present dispute among medical authorities, we cannot ignore that it has become commonplace for a drug or food additive to be universally regarded as harmless on one day and to be condemned as perilous the next. *It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading scientific authorities. The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion.* (emphasis added).

See generally, Blank, *The Delaney Clause: Technical Naivete and Scientific Advocacy in the Formulation of Public*

Health Policies, 62 Calif. L.Rev. 1084 (1975); Destro, *Abortion & the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L.Rev. 1250, 1292-1306 (1975)

CONCLUSION

The issue in this case is not whether D & E abortions are "safe" as a matter of law or whether they can be performed safely in these clinics. Those are essentially legislative judgments. The issue is whether or not the City of Akron can *rationally* conclude that second trimester abortions are more safely performed in hospitals than in clinics. After nearly two and a half weeks of trial, a rather clear picture of how these clinics operate emerges. This Court is urged to study it carefully. It is not too different from that envisioned by Justice Stewart in *Danforth, supra, 428 U.S. 52,*

91n.2-92(1976) (Stewart, J. concurring). Reasonable rules intended to remedy such practices are certainly constitutional.

For all these reasons, respondents urge that the Court should either deny the writ or grant the writ with instructions to the parties to limit themselves in No. 1172 to the question of whether this Court should abandon its holding in *Roe v. Wade, 410 U.S. 113 (1973)* that a state's interest in maternal health becomes "compelling" at the end of the first trimester.

Respectfully submitted,

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PROOF OF SERVICE

Two copies of the foregoing Respondents' Joint Response to Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were mailed to counsel for petitioners this 25th day of February, 1982 addressed as follows:

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signed: ***ROBERT A. DESTRO***

Docket Sheet

NO. 81-1172-CFX VIDE: 81-746 81-854	TITLE Akron Center for Reproductive Health, Inc., et al., Petitioners v. City of Akron, et al.

DOCKETED	COURT
Dec. 19, 1981	United States Court of Appeals for the Sixth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Stephan Landsman
	Counsel for Respondents: Robert A. Destro, Robert D. Pritt, Stephen Landsman
Oct. 8, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until December 19, 1981 by O'Connor, J, Oct. 10, 1981.
Dec. 19, 1981	Petition for writ of certiorari filed. (Record filed).
Jan. 18, 1982	Waiver of right by respondents to file a response to the petition filed.
Jan. 18, 1982	Petitioners' supplement to cross-petition filed.
Jan. 20, 1982	DISTRIBUTED. 2-19.
Jan. 29, 1982	Response requested.
March 1, 1982	Brief for the respondents in opposition filed.
Mar. 31, 1982	DISTRIBUTED. 4-16.
Apr. 20, 1982	REDISTRIBUTED. 4-23. (Stricken)
Apr. 27, 1982	REDISTRIBUTED. 4-30. (Stricken)
May 10, 1982	REDISTRIBUTED. 5-13.
May 17, 1982	REDISTRIBUTED. 5-20.
May 24, 1982	Petition GRANTED. The case is consolidated with 81-746 and a total of one hour is allotted for oral argument.

June 8, 1982	The City of Akron will file its opening brief on July 8, 1982. Akron Center for Reproductive Health, et al. will file their opening brief on August 7, 1982.
June 19, 1982	Brief, amicus curiae, by The Legal Defense Fund for Unborn Children filed. (Vide: 81-746).
June 19, 1982	Motion of Alan Ernest to represent children unborn and born alive filed. (Vide: 81-746).
June 28, 1982	The motion of Alan Ernest to represent children unborn and born alive is DENIED.
July 2, 1982	The City of Akron will file its opening brief on or before July 29, 1982.
July 2, 1982	Akron Center for Reproductive Health, et al., will file their opening brief on or before Aug. 28, 1982.
	(Over)

81-1172

Title

No.

DATE	PROCEEDINGS AND ORDERS
July 26, 1982	Brief, amicus curiae, for Lawyers for Life filed. (Vide: 81-746).
July 19, 1982	Application of respondent and cross petitioner Akron Center for Reproductive Health, Inc., et al. for leave to file its brief on the merits in excess of page limitations, and order denying same by O'Connor, J., 7/26/82.
July 29, 1982	Brief for petitioner (in 81-746) City of Akron filed. (Vide: 81-746).
Aug. 4, 1982	Brief, amicus curiae, of The Catholic League for Religious and Civil Rights filed. (Vide: 81-746).
Aug. 4, 1982	Brief, amici curiae, of Certain Law Professors filed. (Vide: 81-746).
Aug. 4, 1982	Brief, amici curiae, and Annexed Brief of the Committee for Abortion Rights and Against Sterilization Abuse, et al. filed. (Vide: 81-746).
Aug. 4, 1982	Brief, amici curiae, on Behalf of National Organization for Women, et al. filed. (Vide: 81-746).
Aug. 5, 1982	Application by Planned Parenthood Federation of America, Inc. for leave to file a brief as amici curiae in excess of page limitations, and order denying same by Burger, CJ., 8/6/82.
Aug. 7, 1982	Motion of the American Public Health Association for leave to file a brief as amicus curiae filed. (Vide 81-746)
Aug. 17, 1982	Motion of Francois Sequin, M.D., et al. for divided argument and for additional time for oral argument filed. (Vide: 81-746)
Aug. 18, 1982	Opposition of Akron Center for Reproductive Health, Inc. et al. filed. (Vide: 81-746)
Aug. 27, 1982	Brief, amicus curiae, for the American College of Obstetricians and Gynecologists, et al. filed. (Vide: 81-746)
Aug. 27, 1982	Brief, amici curiae, of Women Lawyers of Sacramento, et al. filed. (Vide: 81-746).
Aug. 28, 1982	Brief, amici curiae, of Planned Parenthood Federation of America, Inc., et al. filed. (Vide: 81-746).
Aug. 30, 1982	Brief, amicus curiae, for the NAACP Legal Defense and Educational Fund, Inc., filed. (Vide: 81-746).
Aug. 30, 1982	Brief, amicus curiae, of Certain Religious Organizations filed. (Vide: 81-746).
Aug. 30, 1982	Brief, amicus curiae, of The National Abortion Federation filed. (Vide: 81-746).
Aug. 31, 1982	Brief, amici curiae, of California Women Lawyers, et al. filed. (Vide: 81-746).

(Card No. 2)

NO. 81-1172-CFX VIDE: 81-746 81-854	TITLE Akron Center for Reproductive Health, Inc., et al., Petitioners v. City of Akron, et al.

DOCKETED	COURT
Dec. 19, 1981	United States Court of Appeals for the Sixth Circuit

DATE	PROCEEDINGS AND ORDERS
Sept. 20, 1982	Motion of The Legal Defense Fund for Unborn Children for leave to participate in oral argument as amicus curiae filed.
Sept. 13, 1982	Joint appendix filed. (Vide: 81-746).
Sept. 22, 1982	Brief for cross-petitioners filed. (Vide: 81-746 - respondents in 81-746).
Aug. 11, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sept. 29, 1982	Reply brief for respondent City of Akron filed. (Vide: 81-746 - Petitioners).
Oct. 4, 1982	The motion of the Solicitor General for leave to participate in oral argument as amcus curiae and for divided argument is GRANTED. The motion of Francois Seguin, M.D. et al. for divided argument is DENIED. The motion of The Legal Defense Fund for Unborn Children for leave to participate in oral argument as amicus curiae is DENIED.
Oct. 4, 1982	Brief for respondents Francois Seguin, M.D. and Patricia K. Black filed. (Vide: 81-746).
Oct. 12, 1982	Motion of The Board of Chruch and Society of the United Methodist Church, et al. for leave to join amicus curaie brief of Certain Religious Organizations filed. (Also in 81-746).
Oct. 18, 1982	The motion of The Board of Church and Society of the United Methodist Church, et al. for leave to join the brief, amicus curiae, of Certain Religious Organizations is denied.
Nov. 23, 1982	Reply brief of respondent City of Akron filed. (D). (Vide: 81-746).
Nov. 23, 1982	Reply brief for respondents and cross-petitioners filed. (D) (Vide: 81-746).
Nov. 30, 1982	ARGUED.